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(3)

NO. 94-1964

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN W. SHOEMAKER, ET AL.,

Petitioners,

v.

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER,
on behalf of themselves
and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

APPENDIX

34pp

ing company allegedly negligently commingled with lower grade mineral was adequately established for purposes of applying market value rule for assessing damages, in view of publication that listed average price of high grade mineral.

5. Shipping ⇐131

Published market quotations of bulk commodities provide simple proof of market value and damages so as to support application of market value rule for assessing damages to cargo.

6. Shipping ⇐131

Sales price close in time to discharge date was sufficient to establish market value of downgraded mineral at time it was negligently commingled with high graded mineral for purposes of applying market value rule for assessing damages to shipper.

A. Carter Mills, IV, John C. Persons, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, LA, for appellant.

Richard B. Foster, Lemle & Kelleher, New Orleans, LA, for appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

DUHÉ, Circuit Judge:

Defendant Turner Marine Bulk, a New Orleans stevedore, negligently commingled two lots of ferrochrome that Plaintiff Minerais U.S. Inc. was importing for resale in the United States. Minerais had purchased 700 metric tons (MT) high grade ferrochrome and 1000 MT low grade ferrochrome; 250 MT high grade ferrochrome escaped damage, and the remaining 450 MT high grade and the 1000 MT low grade ferrochrome were commingled. None of the combined material fell within the higher grade, and Plaintiff was forced to downgrade 450 MT high grade material to low grade for purposes of resale. This appeal concerns only the issue of damages.

The district court awarded damages based on wholesale values of the material (i.e., wholesale value of 450 MT high grade ferrochrome minus wholesale value of 450 MT low grade ferrochrome), finding that Plaintiff failed to establish the fair market value as the appropriate measure of damages. Holding that Plaintiff adequately established fair market values, we reverse and remand for application of the market-value rule using retail values as specified herein.

I. The Market-Value Rule.

[1, 2] The market-value rule requires that damages be calculated using market values *at the time the cargo is discharged*. Such a damage award places the injured cargo owner in the same position it was in before the damage. The market-value rule makes the cargo claimant whole by awarding him the difference between the fair market value of the undamaged cargo and the fair market value of the cargo as damaged on the date of discharge at the port of destination. *Cook Indus., Inc. v. Barge UM-308*, 622 F.2d 851, 854 (5th Cir.1980).

[3] Nothing in *Illinois Central Railroad v. Crail* compels use of the wholesale price rather than retail. *See Illinois Cent. R.R. v. Crail*, 281 U.S. 57, 64–65, 50 S.Ct. 180, 181, 74 L.Ed. 699 (1930) ("[The market-value rule] may be discarded and other more accurate means [to measure the loss] resorted to, if, for special reasons, it is not exact or otherwise not applicable.") (awarding wholesale value of lost shipment). *Illinois Central* was a shortage-in-delivery case, not a damaged-goods case; where cargo is downgraded but not completely destroyed, this Court has held the market-value rule to be both a convenient and accurate means of measuring damages. *Cook Indus.*, 622 F.2d at 855–56. We hold the rule provides an accurate measure of damages in this case as well.

A. Fair Market Value of Undamaged Cargo.

[4, 5] In June 1990, when the shipment was discharged in New Orleans, the average market price of high grade ferrochrome was $1.16 per pound of contained chromium, according to *Metals Week* (a weekly publication), which was found by the district court to be the most reliable evidence of the market price. Published market quotations of bulk commodities provide simple proof of market value and damages so as to support application of the market-value rule. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 10–36 (2d ed. 1994); *see also Amstar Corp. v. M/V ALEXANDROS T.*, 472 F.Supp. 1289, 1294 (D.Md.1979), *aff'd*, 664 F.2d 904 (4th Cir.1981). Further, Minerais' retail sales price in August 1990 corroborated *Metals Week* by establishing $1.16 per pound of chromium as the retail price. The market value of high grade ferrochrome at the time of the arrival of the shipment was thus adequately established at $1.16 per pound of chromium.

B. Fair Market Value of Cargo as Damaged.

The 450 MT damaged cargo after commingling was indistinguishable from the 1000 MT low grade ferrochrome with which it was mixed. *Metals Week* did not list a price for low grade ferrochrome at the time of discharge of the shipment, because there was no established market for it at the time. Minerais ordered the low grade to test the market for it. Minerais sold the 1450 MT low grade product in varying quantities over several months and the price varied over those few months. The district court declined to rely on a retail price in part because of the declining market and in part because it was unclear which resale accounted for the 450 MT downgraded material.

[6] We hold that the sales price close in time to the discharge date is nevertheless sufficient to establish the market value of the downgraded product at the time of discharge. Some of the low grade material sold at $.99 per pound chromium in June and July 1990 as shown by two invoices (for sales of 160 MT and 400 MT). These contemporaneous sales provide sufficient evidence from which to apply the market-value rule. *See Standard Oil Co. v. Southern Pac. Co.*, 268 U.S. 146, 155, 45 S.Ct. 465, 466–67, 69 L.Ed. 890 (1925) (recognizing "contemporaneous sales of like property in the way of ordinary business" as one manner of establishing market value); *cf. Holden v. S.S. Kendall Fish*, 396 F.2d 910, 913 (5th Cir.1968) (requiring that damages be calculated at the time of delivery, because the carrier "is not and should not be the guarantor of the ups and downs of commodity prices").

We have no reason to factor in the varying prices of low grade ferrochrome over the ensuing months. Regardless of the fact that Plaintiff intended to introduce only a limited quantity of low grade ferrochrome into the United States market, the sale of 660 MT low grade product for $.99 per pound chromium near the time of delivery provides adequate proof of the fair market value of all of the downgraded product (only 450 MT) at the time of discharge.

II. Conclusion.

Applying the general measure of the shipper's recovery, i.e., the difference in market values before and after damage to the damaged cargo, will accurately compensate Plaintiff. Plaintiff having provided sufficient evidence of fair market values of both high and low grade ferrochrome at the time of delivery, we remand for calculation of damages under the market-value rule using the June 1990 retail values.

REVERSED and REMANDED.

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Glenn S. KELLOGG; Lani R. Smith; Lawrence Dessenberg; John Stamper; Michael Jones; Robert Donley; Daniel Schreiber; and Michael Karhoff, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

John W. SHOEMAKER, et al., Defendants-Appellees.

No. 93-4287.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 13, 1994.

Decided Jan. 9, 1995.

As Revised on Denial of Rehearing Feb. 28, 1995.

Prison inmates challenged constitutionality of new Ohio Parole Revocation proce-

dures. The United States District Court for the Southern District of Ohio, Sandra S. Beckwith, J., granted summary judgment for Parole Authority after Authority amended regulation and held that new policy rendered challenges moot. Appeal was taken. The Court of Appeals, Wellford, Circuit Judge, held that: (1) challenge to constitutionality of Ohio's new parole procedures was not moot where Parole Authority had substituted new procedure on eve of adjudication; (2) Parole Authority had power to address by means of administrative role cases in which parolee had been convicted of another felony while on parole; and (3) new state parole regulations which eliminated parolee's right to individual hearing where parole was convicted of felony while on parole could not be applied to parolees who committed initial crime before new regulations came into effect.

Affirmed in part; reversed and remanded in part.

1. Federal Courts ⇐13.15

Challenge to constitutionality of Ohio's new parole procedures was not moot where Parole Authority had substituted new procedure on eve of adjudication of challenge to old procedure. 42 U.S.C.A. § 1983; Ohio Admin.Code § 5120:1-1-12.

2. Federal Courts ⇐13.15

For purposes of determining whether action is moot, Parole Authority may not abort or delay constitutional review of parole procedures by substitution of new procedure on eve of adjudication.

3. Pardon and Parole ⇐65.1, 69

Ohio Parole Authority had power to administer all statutes relating to parole, including the power to determine whether convict had violated parole. Ohio R.C. §§ 2967.02, 2967.16.

4. Pardon and Parole ⇐86

Ohio statute requiring that parolee be given individual parole revocation hearing when parole officer has begun revocation hearing on his own initiation does not apply when basis for parole revocation is subsequent conviction. Ohio R.C. § 2967.16.

5. Pardon and Parole ⇐71, 86

State Parole Authority can declare that parolee who has been convicted of subsequent violation while on parole is in violation of parole either by means of administrative rule or through individual hearing. Ohio R.C. § 2967.16.

6. Pardon and Parole ⇐71, 86

State Parole Authority has power to address cases in which parolee has been convicted of another felony while on parole by means of administrative rule, rather than individual hearing, which includes power to find that no mitigating circumstances would overcome subsequent conviction of another felony committed while on parole so that individual hearing is not necessary. Ohio R.C. § 2967.16.

7. Pardon and Parole ⇐72.1, 86

Parole Authority does not have to have discretion as to whether to revoke parolee's parole status, but, if it has that discretion, revocation hearing is required.

8. Constitutional Law ⇐272.5
Pardon and Parole ⇐85, 90

Ohio parole procedures which did not allow individual hearing for parolees once subsequent parole violation conviction is established and which did not allow parole agency to consider further mitigating factors was constitutional and did not violate parolee's due process rights. U.S.C.A. Const. Amends. 5, 14.

9. Constitutional Law ⇐199

To establish ex post facto violation, plaintiffs must show that regulation at issue is retroactive in its application and will disadvantage offender affected by it. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

10. Constitutional Law ⇐199

Focus in determining whether new law violates ex post facto clause is time that offense was committed. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

11. Constitutional Law ⇐199

Change in law that alters substantial right can be ex post facto even if statute takes seemingly procedural form. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

12. Constitutional Law ⇐203
Pardon and Parole ⇐86

For purposes of determining whether new state parole procedures violated ex post facto clause, fact that change in right to hearing on revocation of parole involved procedural matter did not change fact that new law affected substantive rights attendant to parole revocation, so that ex post facto violation was possible. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

13. Constitutional Law ⇐203
Pardon and Parole ⇐86

Although new state parole regulations affected parolee's substantive rights by changing entitlement to individual revocation hearing, regulations were not ex post facto violation as to inmates whose paroles were revoked after hearing under old regulations or as to those who committed initial crime after date of enactment. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

14. Pardon and Parole ⇐86

New state parole regulations which eliminated parolee's right to individual hearing where parolee was convicted of felony while on parole could not be applied to parolees who committed initial crime before new regulations came into effect but whose parole revocation proceedings would occur after new procedures were to take effect.

Kenneth R. Spiert (argued and briefed), Public Defender's office, Ohio Public Defender Com'n, Columbus, OH, for plaintiffs-appellants.

Donald A. Cataldi (briefed) and Charles L. Wille (argued), Office of the Atty. Gen. of Ohio, Columbus, OH, for defendant-appellee.

Before: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

1. Kellogg's probation had been revoked after he was convicted of new felonies (Attempted Grand Theft, Possession of Criminal Tools, Breaking and Entering, and Drug Abuse with prior drug law conviction) while on parole.

WELLFORD, Circuit Judge.

Glenn S. Kellogg ("Kellogg"), an Ohio prison inmate, initiated a 42 U.S.C. § 1983 class action suit in 1990 seeking declaratory and injunctive relief with respect to certain Ohio parole revocation procedures.

This case began in federal court in August 1990, when Kellogg [1] filed a pro se complaint alleging, under 42 U.S.C. § 1983, that the Ohio Parole Revocation procedures violated his procedural due process rights. The Ohio public defender, who began representing Kellogg, moved to certify a class to challenge certain parole revocation procedures. The district court certified the class to include "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole."

The provisions of Ohio law now under attack are the new "emergency" provisions that the Ohio Adult Parole Authority ("agency") enacted effective September 1, 1992. Originally, the class brought its action against the older repealed provisions, which were discretionary and would have required Ohio to provide parolees with a "meaningful" hearing prior to revoking their parole.[2] Under these old regulations, a parolee convicted of a subsequent crime in Ohio, while on parole, was conclusively presumed to be in violation of his parole. The parolee under the old regulations, however, was entitled to a hearing to present any relevant mitigating circumstances. Although plaintiff parolees seem to concede they were given a "hearing" under the old regulations, they argued that it did not meet the procedural requirements that *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), required. The district court agreed with their argument, holding that the parolees did not receive sufficient notice, were denied the assis-

2. Section 5120:1-1-19(I) provided: "In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated."

tance of counsel, and were not permitted to call or to subpoena witnesses.

The agency then repealed the old regulations and implemented new ones. The new regulations did away with any type hearing if the defendant was convicted by an Ohio court "for an offense he committed while on any release granted by the Adult Parole Authority...." There would no longer be a hearing to determine mitigating circumstances surrounding the revocation. The only process the parolees would receive would be the parole authority's verification "that the sentence was imposed for an offense that occurred while the prisoner was under release status."

The agency revised the parole procedures to eliminate any agency's discretion in deciding whether to revoke parole. *See Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985), which had indicated that the hearing procedures required in *Morrissey* were applicable only if the parole board exercised discretion in revoking parole. *See also Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993); *Harrison v. Parke*, 1990 WL 170428 (6th Cir.).

The district court then granted summary judgment in favor of the agency, sustaining its reliance on the amended regulation. The district court held that the new policy rendered the plaintiffs' challenges moot. The district court refused to amend its judgment and refused to grant plaintiffs any relief. The district court discussed rejecting the merits of the plaintiffs' constitutional challenges to the new regulations.

Plaintiffs appeal in order to challenge the district court's holding that the change in the parole procedures rendered the plaintiffs' constitutional challenges moot. Plaintiffs contend that the agency violated its rule-making powers by adopting the new procedures. Plaintiffs also argue that this court should reconsider *Sneed v. Donahue*, which held that a parole board was not required to provide the parolee with a hearing if the board exercised no discretion in revoking parole. Last, they wish to challenge the constitutionality of the new regulations, arguing that the change of the parole procedures in this respect constitutes a violation of the *ex post facto* clause.

I. *JURISDICTION AND STANDARD OF REVIEW*

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 since there is an appeal from a final order of the district court. The appropriate standard of review is *de novo* because the appeal concerns issues of law.

II. *MOOTNESS*

There is some confusion as to whether the district court held that the plaintiffs' constitutional challenges to the *new* procedures were moot. The district court discussed the constitutional merits of the plaintiffs' arguments, but refused to amend the court's judgment dismissing the claims of plaintiffs:

> Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC § 6120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition against *ex post facto* laws.... As this court ruled in its *Opinion and Order* entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearing or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful hearing in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC § 120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

[1] The plaintiffs do not contest the mootness of their challenges to the original procedures.[3] Plaintiffs argue, however, that they should be allowed to challenge the constitutionality of the *new* parole procedures.

We note that considerable controversy surrounds the mootness doctrine after *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). One rationale holds that the mootness doctrine is fundamentally tied to the case and controversy language of Article III, and, therefore, the court may only review if there is a justiciable issue. Another view is that the mootness doctrine is more flexible, and may be used to accomplish prudential concerns to avoid the squandering of judicial resources after the decisional process is underway. *See* Corey C. Watson, *Mootness and the Constitution*, 86 Nw.U.L.Rev. at 143.

[2] Under either rationale, the plaintiffs' challenge to the new procedures are not moot. The parole authority may not be allowed to abort or delay constitutional review of the parole procedures by substitution of a new procedure on the eve of adjudication. Prudential concerns also require us to hear this case rather than to dismiss it as moot as to those plaintiffs who are alleged to have committed offenses and had their paroles revoked prior to September 1, 1992. We conclude that a "case or controversy" exists, and that plaintiffs have raised proper concerns about the regulations' constitutionality as applied to offenses which occurred prior to the date of the amendment.

III. *DISCUSSION*

A. *Whether the agency violated its rule-making authority by adopting the new parole revocation procedures?*

The plaintiffs make two arguments in this respect. First, the plaintiffs argue that parole authority only has power to make administrative rules and not broad legislative policy rules. Second, the plaintiffs argue that even if the parole authority has the power to make broad policy rules, the new regulations conflict with Ohio statutes.

[3] The plaintiffs' first argument is unavailing. The Ohio parole authority is charged with administering all statutes relating to parole, *see* O.R.C. § 2967.02, including determining whether a convict has violated parole. O.R.C. § 2967.15. The parole authority has a long history of making regulations governing parole revocation. It should be noted that the plaintiffs did not contest the authority's power to issue the old regulations; they only challenged the *application* of the old regulations, arguing that a hearing to present mitigating circumstances was not a "meaningful hearing."

[4] Second, plaintiffs argue that the new parole revocation procedures are inconsistent with § 2967.15 of the Ohio Code, which requires that a parolee be given an individual parole revocation hearing when a *parole officer* has begun the parole revocation hearing on his own initiative. This case, however, does not involve a situation in which the parole officer has begun the parole revocation proceedings on his own initiative, or based on his charge or conduct, which has not resulted in a conviction.[4] Instead, this case is governed by a different provision of § 2967.15.

[5, 6] The legislature has *not* specifically required an individual hearing when the basis for the parole revocation is a subsequent conviction. The statute provides only: "A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the condition of his pardon or parole shall be declared a violator." O.R.C. § 2967.15. Thus, the agency can "declare" a parolee to have been convicted of a subse-

3. It is apparent that the changes in the parole procedure rendered the plaintiffs' challenges to the original procedures moot. There is no need for this court to issue an injunction when the parole board has voluntarily changed its allegedly unconstitutional practices. *See Cotton v. Mansour*, 863 F.2d 1241, 1244-45 (6th Cir.1988), *cert. denied*, 493 U.S. 1042, 110 S.Ct. 835, 107 L.Ed.2d 831 (1990) (refusing to enjoin a social service agency's calculation of food stamp eligibility after the agency changed its practice to comply with federal regulations because "[t]here was simply no ongoing violation ... to enjoin"). *See also* Corey C. Watson, Comment, *Mootness and the Constitution*, 86 Nw.U.L.Rev. 141, 147 (1991). Any remedy that a member of the class has for the unconstitutional application of the old parole procedures must, in the future, be obtained through habeas corpus.

4. The parole authority does conduct an individual hearing in these circumstances.

quent violation while on a parole to be a "violator" either by administrative rule or through an individual hearing. The agency has chosen to address these cases by administrative rule, which is logical as those parolees who have been *convicted* of another felony while on parole have already had a trial or hearing to determine whether they actually committed the offense charged.[5] The agency has also concluded, by administrative rule, that no mitigating circumstances would overcome a subsequent conviction of another felony committed while on parole; thus, an individual hearing would be unnecessary. The agency's conclusion is a permissible one, as we have articulated previously in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993). We find no merit, therefore, in plaintiffs' contentions in this regard.

B. *Whether this court should reconsider its decision in Sneed v. Donahue.*

Alternatively, plaintiffs ask us to reconsider our decision in *Sneed v. Donahue*, 993 F.2d 1239 (6th Cir.1993), in which we upheld the constitutionality of the Kentucky Parole statutes that eliminated any hearing on parole violation if the parolee was convicted of a new felony while on parole. The Kentucky and proposed Ohio parole revocation statutes are identical in that each statute eliminates agency discretion and directs revocation when a parolee has been convicted of a subsequent violation while on parole.

[7] We held in *Sneed* that the parolee "had no clearly established right to a parole revocation hearing" once a subsequent parole violation conviction had been established and the law gave the parole agency no authority to consider further mitigating factors.

> The Supreme Court in *Morrissey* [*v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)] clearly instructed that the purpose of a final revocation hearing is to give the parolee an opportunity to present facts challenging the determination that he has violated a condition of parole and to present all circumstances surrounding the violation to the parole authority so that it may exercise *its discretion* in a fully informed manner. In this case, however, a revocation hearing would serve no such purposes. It is undisputed that Sneed violated a condition of his parole and has met all the factual predicates required by Ky.Rev. Stat. § 439.362 before that section can be applied to him. In addition, it would be pointless for him to present mitigating circumstances to the Board since the Board has *no discretion* in determining whether to revoke his parole status....

Sneed, 993 F.2d at 1243 (emphasis in original). Our conclusion in *Sneed* is supported by *Black v. Romano*, 471 U.S. 606, 612, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636 (1985), in which the Supreme Court stated that

> [n]either *Gagnon* [*v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)] nor *Morrissey* considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition of probation or parole. *Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decision maker.*

Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole. Thus, *Black* teaches that *Morrissey* does not require that a parole authority be given discretion regarding when to revoke a parolee's parole status; rather, it simply requires that when such discretion is given, a revocation hearing is required. *Sneed*, 993 F.2d at 1243, 1244.

[8] As pointed out also in *Sneed*, two other courts have reached this same result: *United States v. Cornog*, 945 F.2d 1504 (11th Cir.1991); *Pickens v. Butler*, 814 F.2d 237 (6th Cir.), *cert. denied*, 484 U.S. 924, 108 S.Ct. 284, 98 L.Ed.2d 245 (1987). We have no occasion (or authority) to revisit *Sneed*, and we decline plaintiffs' invitation to do so. Plaintiffs have, accordingly, shown no due process violation by the amended procedure adopted by defendants in Ohio. This procedure would apply to all situations in which a party or parolee was convicted of an offense after September 1, 1992.

5. Even under the old regulations, the parolee did not receive an individual hearing on every issue, because he was conclusively presumed to be a parole violator if he had been convicted of another felony while on parole. The only issue at the hearing was whether mitigating circumstances warranted leniency in revoking his parole.

C. *Whether the new parole regulations violate the ex post facto clause of the United States Constitution.*

[9] As to the *ex post facto* challenge, we have considered this challenge in two nonbinding parole guideline cases: *Persky v. Edwards*, 1986 WL 16754 at *3 (6th Cir.); *Ruip v. United States*, 555 F.2d 1331, 1335 (6th Cir.1977). This case, by contrast, involves binding regulations that are mandatory after September 1, 1992, and eliminates any discretion in the parole agency to consider mitigating circumstances. To establish the claimed *ex post facto* violation, plaintiffs must establish that the regulation at issue (1) is retroactive in its application, and (2) "must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)). *See also Dale v. Haeberlin*, 878 F.2d 930, 935 (6th Cir.1989), *cert. denied*, 494 U.S. 1068, 110 S.Ct. 1528, 108 L.Ed.2d 767 (1990). In this case, the agency action in amending the pertinent regulation has the same effect as legislation for the purpose of *ex post facto* consideration.

[10] The focus in determining whether a new law violates the *ex post facto* clause is the time the offense was committed. *Weaver*, 450 U.S. at 31, 101 S.Ct. at 965. *See also Persky v. Edwards*, 1986 WL 16754 (6th Cir.) (*quoting Forman v. McCall*, 709 F.2d 852, 859 (3d Cir.1983)) ("[I]t is a fundamental principle of ex post facto jurisprudence that a court entertaining an ex post facto claim must focus upon the law in effect at the time of the offense for which a person is being punished."); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979) ("[A]lthough parole eligibility is determined as of the date of sentencing for some purposes ... the ex post facto clause looks to the punishment annexed at the time the crime was committed.").

[11] Next we look to whether the new regulations are more onerous than the regulations in effect at the time this subclass committed their initial crime. The defendants, relying on *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), argue that the change is merely a procedural change, and does not affect the substantive rights of the plaintiff class. *See Dobbert*, 432 U.S. at 293, 97 S.Ct. at 2298 ("Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). Although the distinction between substance and procedure might sometimes be elusive, "a change in the law that alters a substantial right can be ex post facto 'even if the statute takes a seemingly procedural form.'" *Miller v. Florida*, 482 U.S. at 433, 107 S.Ct. at 2453. Although the change here involves a procedural matter—the right to a hearing on revocation of parole—it still affects substantive rights attendant to parole revocation. Under the old regulations, parole would be revoked for the full amount of time *unless* the inmate could convince the parole authority that mitigating circumstances warranted mercy. Under the new procedures, there is no opportunity to present these mitigating circumstances. This procedural change affects *substantive* rights.

[12-14] Thus, the new regulations may violate the *ex post facto* clause for a portion of the plaintiff class wherein described. The plaintiff class in this case has been defined broadly to include: "all persons whose parole was, or will be, revoked by the Ohio Adult Parole Authority through a so-called parole-violator recommissioned hearing because they have been convicted of a new felony committed while on parole." Obviously, the new regulations cannot be deemed to be an *ex post facto* violation as to those inmates whose paroles were revoked after a hearing under the old regulations, because the new parole regulations were not applied to them. Likewise, the statute is not *ex post facto* as

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to those who committed their "initial crime" [6] after the date of enactment (September 1, 1992). The district court's opinion, however, does not take into account those plaintiffs who committed their initial crime before the new regulations came into effect but whose parole revocation proceedings will be governed by the new regulations.[7] The new regulations are retroactive only to these members of this class.[8]

To the extent any plaintiff falls into this designated category, he is entitled under the old regulations to a meaningful hearing as described in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). We may only provide prospective injunctive relief in this present case to those inmates, if any, who had committed their initial crime prior to September 1, 1992, and whose parole may be revoked under the new regulations. Only these plaintiffs have a claim to injunctive relief.

IV. *CONCLUSION*

In summary, we **AFFIRM** the district court in all respects, except as to those prisoners, if any, who committed initial offenses prior to September 1, 1992, but whose parole revocation procedures will be governed by the new regulations. Likewise, we **REMAND** the *ex post facto* claim for the district court to provide prospective injunctive relief as to those limited members of the plaintiff class described in this opinion.

6. We use the term "initial crime" to refer to the crime from which the inmate has been paroled. It does not refer to the subsequent violation while on parole.

7. The district court concluded that the "defendants have not retroactively applied [the new regulations] to the subclass of plaintiffs whose parole had been earlier revoked...."

8. At oral argument, the Ohio Attorney General's office stated that there had been no such actions taken.

David Lee BOYES, Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant-Appellee.

No. 93-4012.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 18, 1994.

Decided Dec. 13, 1994.*

Mentally impaired social security disability and supplemental security income (SSI) claimant filed complaint challenging final decision of Secretary of Health and Human Services denying benefits. The United States District Court, Northern District of Ohio, John M. Manos, J., affirmed Secretary's decision, and claimant appealed. The Court of Appeals, Suhrheinrich, Circuit Judge, held that: (1) claimant's past relevant work as roadside rest cleaner was not "substantial gainful activity," given special conditions under which he performed his work, and (2) administrative res judicata did not bar claimant from challenging prior determination that his roadside maintenance work constituted substantial gainful activity.

Reversed and remanded.

1. **Social Security and Public Welfare** ⇐143.40

Claimant bears burden of proving his entitlement to social security disability and supplemental security income (SSI) benefits. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).

2. **Social Security and Public Welfare** ⇐143.75

Social security disability and supplemental security income (SSI) claimant's past relevant work as roadside rest cleaner was not "substantial gainful activity," given special conditions under which he performed his work; adult services director at workshop purported that claimant's productivity was less than one half that of typical nonimpaired person, and claimant relied on special transportation to get to and from work and completed his work duties through constant on-site supervision. Social Security Administration Regulations, 20 C.F.R. §§ 404.1520(e), 404.1573(b, c), 42 U.S.C.A.App.; 20 C.F.R. § 416.920(e).

3. **Administrative Law and Procedure** ⇐501

Social Security and Public Welfare ⇐142.20

Administrative res judicata did not bar social security disability and supplemental security income (SSI) claimant from challenging prior determination that his prior roadside maintenance work constituted "substantial gainful activity"; record showed that ALJ reopened merits of that decision in reviewing benefits claim.

Marcia W. Margolius (argued and briefed), Brown & Margolius, Cleveland, OH, for plaintiff-appellant.

Kent W. Penhallurick, Asst. U.S. Atty., Cleveland, OH (argued and briefed), for defendant-appellee.

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and ZATKOFF, District Judge.**

SUHRHEINRICH, Circuit Judge.

David Boyes appeals the district court's judgment affirming the Secretary's final decision denying Boyes' application for disability insurance benefits and supplemental security income (SSI) under the Social Security Act. For the following reasons, we REVERSE and REMAND for an award of benefits.

I.

Boyes received disabled child's insurance benefits because of a mental impairment (full scale IQ of 59) based on a May 10, 1976 application. In May of 1974, Boyes entered a sheltered workshop, and after the Secretary determined in May 1986 that his work as a roadside rest cleaner constituted substantial gainful activity, the benefits were terminated. The termination letter indicated that Boyes' earnings exceeded the $300 per month level presumed to indicate substantial gainful activity. *See* 20 C.F.R. § 404.1574(b)(2)(vi). Boyes never sought review of this determination.

In January 1989, Boyes filed for SSI, disabled child's benefits and disability insurance benefits. He alleged disability since June 1988, based on mental impairment. The Secretary denied all three applications on May 8, 1989. Boyes failed to seek review; however, in September 1989, he filed second applications for disability insurance benefits and SSI. Boyes alleged that he became unable to work on May 10, 1989 (disability insurance applications), and August 29, 1989 (SSI application), because of mild mental retardation and health problems, including tracheobronchitis, hiatal hernia and a hole in his heart. The applications were denied, and Boyes filed a complaint in district court. The district court affirmed the Secretary's decision.

Boyes contends that the district court erred because the evidence was insufficient to show he possessed the residual functional capacity to engage in employment at a competitive level. According to Boyes, his past relevant work did not constitute substantial gainful activity. Therefore, he asserts his burden of proving an entitlement to benefits has been fulfilled.

II.

[1] On review, the Secretary's factual findings are conclusive when supported by

* This decision was originally issued as an "unpublished decision" filed on December 13, 1994. On January 18, 1995, the court designated the opinion as one recommended for full-text publication.

** The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

A-5

NO. 93-4287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENN S. KELLOGG; LANI R. SMITH; JOHN STAMPER; LAWRENCE DESSENBERG; ROBERT DONLEY; MICHAEL JONES; MICHAEL KARHOFF; DANIEL SCHREIBER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. JOHN W. SHOEMAKER, ET AL., Defendants-Appellees.	)	FILED FEB 28 1995 LEONARD GREEN, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

ORDER

The parties in this case have called the court's attention to an inconsistency in the body of our opinion filed January 9, 1995, by filing petitions for rehearing. Upon consideration, we shall revise the opinion by striking therefrom the phrase, "and also a parole violation offense conviction" from the first sentence of "IV. *CONCLUSION*," p. 12. We shall also strike this phrase from line three of the Judgment in this case entered January 9, 1995. Both petitions for rehearing are DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Jr.
CLERK

Mag. Judge
Docketed
5-30-03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

03 MAY 27 PM 1:14
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, inmates whose parole has been revoked by the Ohio Adult Parole Authority ["APA"], bring this action on behalf of themselves and of a class of plaintiffs for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of their final parole revocation proceedings. This matter is now before the Court on the parties' cross-motions for summary judgment.

The plaintiff class is composed of parolees whose parole has been or will be revoked because they have been convicted of a subsequent felony committed while on parole. Referred to by the APA as Parole Violator Recommissioned ["PVR"], each inmate was provided a final parole revocation hearing. The regulation governing those hearings, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), provided that the subsequent felony conviction creates a conclusive presumption that the inmate has violated his parole, and that the scope of the final revocation hearing would be

strictly limited to the issue of mitigation.[1] Plaintiffs claim that their procedural due process rights have been abridged in several respects by the manner in which their PVR hearings were held. Plaintiffs and defendants have filed motions for summary judgment.

Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original); Kendall v. The Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

The standard to be applied by the Court on motion for summary judgment mirrors the standard for a directed verdict.

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[1]OAC §5120:1-1-19(A)(1) provides:

> In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 [providing that all the conditions of parole include a requirement that the parolee abide by all federal, state and local laws] has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. Bill Johnson's Restaurants Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Rule 1 of the Federal Rules of Civil Procedure).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord, Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir. 1984), cert. denied, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Association, Inc., 630 F.2d 1155, 1158 (6th Cir. 1980).

Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60; Smith v. Hudson, 600 F.2d 60, 65 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

If the moving party meets its burden and if adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 326. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 251 (quoting Improvement Co. v. Munson, 14 WALL. 442, 448 (1872)). As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his ... [pleadings] in opposition to a properly supported motion for summary judgment against him." First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 259 (footnote omitted).

The process due parolees charged with violating

conditions of their parole has changed over time. The United States Supreme Court first held, in Morrissey v. Brewer, 408 U.S. 471 (1972), that a parolee's "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." Id., 408 U.S. at 482.

First, the Supreme Court held, a parolee is entitled to prior notice and a reasonably prompt informal inquiry, conducted by an impartial hearing officer, to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. At this preliminary revocation hearing, the parolee is entitled to present relevant information and to question adverse witnesses unless security considerations indicate otherwise. The neutral hearing officer must summarize the evidence and state the reasons for his decision. Id., 408 U.S. at 484-87.

If probable, or reasonable, cause is found to believe that the parolee has violated one or more conditions of his parole, the parolee is then entitled to a final revocation proceeding before a neutral and detached hearing body. The parolee must have been given written notice of the claimed violations and must be advised of the evidence against him. He may be entitled to counsel and must be afforded an opportunity to be heard in person and to present witnesses and documentary evidence. He also has the right to confront and examine adverse witnesses unless security considerations militate against this. A written statement of the evidence relied on and reasons for revoking parole must be

provided. Id., 408 U.S. at 487-90. See also Gagnon v. Scarpelli, 411 U.S. 778 (1973) [extending the same due process protections to persons charged with violating conditions of probation].

Thereafter, the United States Court of Appeals for the Sixth Circuit commented that, "The automatic revocation of parole for every parole violation, regardless of the mitigating circumstances, clearly runs counter to the dictates of ... Morrissey v. Brewer." Preston v. Piggman, 496 F.2d 270, 275 n.1 (1974). The Court held specifically in Moss v. Patterson, 555 F.2d 137 (6th Cir.), cert. denied sub nom. Kette v. Moss, 434 U.S. 873 (1977), that a final revocation proceeding consistent with the dictates of Morrissey v. Brewer must be afforded even parolees convicted of a subsequent felony.

Plaintiffs in this case challenge the constitutional sufficiency of the final revocation proceedings afforded to PVRs in Ohio under OAC §5120:1-1-19(A)(1). The evidence currently before the Court indicates that hearings held at the correctional institution before the parole panel pursuant to O.A.C. §5120:1-1-19(A)(1) failed to provide to PVRs notice sufficient to enable them to marshall witnesses or other information for presentation in mitigation. Moreover, PVRs are denied the assistance of counsel and are not permitted to call or to subpoena witnesses to testify on their behalf at the final hearing. Although documentary evidence submitted in mitigation by the PVR will ordinarily be accepted by the parole panel, the panel does not take into account such information in determining whether or not the PVR's parole

status should be revoked. Finally, the parole panels exercise no discretion in whether or not to revoke the PVR's parole. In this regard, the prevailing view among state officials is that parole panels have no discretion to take any action other than revocation of parole until after the minimum term of imprisonment on the new felony conviction has been served.

Defendants contend, first, that the procedures followed under OAC §5120:1-1-19(A)(1) do not contravene any constitutional dictates because PVRs, who are already in custody on the new conviction, do not in fact qualify as parolees. Accordingly, defendants argue, no action taken by parole officials can result in the deprivation of the PVRs' liberty. This argument is specious.

The United States Court of Appeals for the Sixth Circuit has specifically recognized that PVRs in Ohio are entitled to a final revocation hearing consistent with Morrissey and Gagnon. Inmates' Councilmatic Voice v. Rogers, 541 F.2d 633 (6th Cir. 1976). Moreover, Moody v. Daggett, 429 U.S. 78 (1976), made clear that a parolee's incarceration on an entirely new charge is not co-extensive with the revocation of his parole. Finally, it is indisputable that the actual result of the final parole revocation hearing is the panel's revocation of the PVR's parole.

Defendants have now, however, substituted OAC §5120:1-1-19(A)(1) with OAC §5120:1-1-21, which provides, in pertinent part:

> (A) The Adult Parole Authority shall revoke the release of any releasee who is recommitted to the Department of Rehabilitation and Correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the

> Adult Parole Authority or while serving a period of intermediate transitional detention pursuant to Rule 5120-11-12 of the Administrative Code or serving a period of parole supervision pursuant to Rule 5120-11-19 of the Administrative Code.
>
> (B) This revocation shall be accomplished by the issuance of minutes by the Adult Parole Authority after it has been verified that the sentence was imposed for an offense that occurred while the prisoner was under release status (emphasis added).

Thus, unlike former OAC §5120:1-1-19(A)(1), the currently controlling regulation, OAC §5120-1-1-21, no longer allows the APA any discretion as to whether or not to revoke the parole of a PVR. The revocation is effected simply upon verification by the APA that the PVR has been convicted of another criminal offense committed while on parole, and the declaration of revocation by the APA by means of the "issuance of minutes."

In Black v. Romano, 471 U.S. 606 (1985), the United States Supreme Court distinguished statutory or regulatory schemes that vested discretion in a parole authority in the revocation process from those that did not:

> [N]either Gagnon nor Morrissey considered a revocation proceeding in which the factfinder was required by law to order incarceration upon finding that the defendant had violated a condition or probation or parole. Instead, those cases involved administrative proceedings in which revocation was at the discretion of the relevant decisionmaker. (citations omitted). Thus, the Court's discussion of the importance of the informed exercise of discretion did not amount to a holding that the factfinder in a revocation proceeding must, as a matter of due process, be granted discretion to continue probation or parole (emphasis added).

Id., 471 U.S. at 612. As a result, what had been perceived to be an unconditional right to a parole revocation hearing with certain due process safeguards now seems to turn on whether or not discretion is reposed in the factfinder.

All of the judicial authority after Black v. Romano has held that, if the decisionmaker retains any discretion in determining whether or not parole should be revoked, the procedural safeguards of Morrissey must be followed. On the other hand, if discretion is lacking and the revocation of parole is automatic once the fact of a subsequent conviction is established, a parolee is afforded no further due process safeguards and, indeed, no revocation hearing. Pickens v. Butler, 814 F.2d 237, 239 (5th Cir.), cert. denied, 484 U.S. 924 (1987); Alevras v. Neubert, 727 F.Supp. 852, 853-54 (S.D. N.Y. 1990); Witzke v. Withrow, 702 F.Supp. 1338, 1351 (W.D. Mich. 1988). See also United States v. Cornec, 945 F.2d 1504, 1512-13 (11th Cir. 1991). The operative question here, then, is whether Ohio currently vests any discretion in the parole panel in determining whether or not a PVR's parole will be revoked. The plaintiff class contends that Ohio law does. Specifically, plaintiffs argue that the parole board may effectively continue parole simply "[b]y not verifying the facts or by not issuing the minutes, or by delaying either act, ..." Plaintiffs' Reply to Defendants' Memorandum Contra Plaintiff Class' Motion for Summary Judgment, at 12. See also United States v. Cornec, 945 F.2d 1504. However, this argument ignores the specific language of OAC §5120:1-1-21(A), which requires that the APA "shall

revoke the release" of any parolee recommitted to the Ohio Department of Rehabilitation and Correction to serve a sentence imposed upon him for an offense committed while on parole (emphasis added).

Plaintiffs also contend that, regardless of OAC §5120-1-1-21, the APA is vested with discretion by virtue of O.R.C. §2967.17, which provides:

> The adult parole authority may, in its discretion, grant an administrative release:[2]
>
> (A) To a parole violator serving another felony sentence in a penal institution within or without this state for the purpose of consolidation of the records or where justice would be best served;
>
> (B) To a parole violator at large whose case has been inactive for at least ten years following the date of declaration of parole violation.
>
> An administrative release shall not be granted except upon the concurrence of a majority of the parole board and approval of the chief of the adult parole authority and shall not operate to restore the rights and privileges forfeited by conviction as provided in section 2961.01 of the Revised Code. Any person granted an administrative release under this section may subsequently apply for a commutation of sentence for the purpose of regaining the rights and privileges forfeited by conviction.

See State v. Dean, 1986 WL 9071 (Ross Cty. App. 1986) [an Ohio parolee was administratively released from parole following his sentence to life imprisonment in another state]. The statute

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[2]"Administrative release" is defined as "a termination of jurisdiction over a particular sentence by the [APA] for administrative convenience." O.R.C. §2967.01(C).

does not vest any discretion in the APA or its panels in connection with the revocation of a PVR's parole. Accordingly, OAC §5120:1-1-21, which does divest all discretion from the APA in this regard, is not inconsistent with this statute.

Plaintiffs also take the position that OAC 5120:1-1-21 is ineffective because it is inconsistent with Ohio statutory law. In Ohio, an agency "may not issue rules which are unreasonable or are in clear conflict with statutory enactment covering the same subject matter." Carroll v. Department of Administrative Services, 10 Ohio App. 3d, 108, 110 (1983). Plaintiffs take the position that OAC §5120:1-1-21, which purports to divest the APA of all discretion where the issue of revocation of PVRs is concerned, is inconsistent with ORC §2967.15, which provides, in pertinent part:

> A convict who has been conditionally pardoned or a prisoner who has been paroled, and who, in the judgment of the adult parole authority, has violated the conditions of his pardon or parole shall be declared a violator. In such case, the time from the date of the declared violation of his pardon or parole to the date he becomes available for return to the institution shall not be counted as a part of time or sentence served.

The Ohio APA is charged with administering all statutes relating parole. O.R.C. §2967.02. Read together, O.R.C. §§2969.02 and .15 reflect the General Assembly's intent to confer upon the APA the authority to determine those circumstances under which a person released on parole should be declared a violator and returned to the institution from which he was paroled. The statutes do not require that individual members of the APA or that panels of the APA exercise that discretion in each individual case. Accordingly,

a regulation such as OAC §§5120:1-1-21, which expressly articulates one circumstance under which the APA will revoke a parolee's parole, is not, in the judgment of this Court, inconsistent with ORC §2967.15.

In short, then, this Court concludes that OAC §§5120:1-1-21 is a valid exercise of rule-making authority and serves to divest individual APA panels of discretion in the decision whether or not to revoke a PVR's parole.

Because, under the new administrative regulation, individual parole panels no longer have discretion with respect to the revocation of the parole of any PVR, the due process protections afforded parolees by Morrissey v. Brewer are no longer applicable. See Pickens v. Butler, 814 F.2d 237. See also United States v. Cornog, 945 F.2d 1504 (11th Cir. 1991); Black v. Romano, 471 U.S. 606.

Defendants contend that, with the passage of the new regulation, the issues in this case have been rendered moot. Plaintiffs disagree.

The second amended complaint, filed December 9, 1992, challenges the PVR revocation procedure in place at the time the complaint was filed, alleging specifically that that procedure violated the due process rights of the members of the plaintiff class. Plaintiffs seek declaratory relief declaring that the revocation procedure is unconstitutional by virtue of the facts that that procedure fails to give members of the plaintiff class reasonable and adequate notice of the scheduling of the PVR hearing

and of the PVRs' rights at the hearing, fails to provide a meaningful opportunity to present evidence and argument as to mitigation, and prohibits the exercise of discretion by the members of the Parole Board in light of mitigating factors. Second Amended Complaint, at 6. The plaintiffs also seek preliminary and injunctive relief

> restraining, prohibiting, and enjoining Defendants from approving, implementing, or enforcing PVR revocation procedures which deprive Plaintiffs and all others similarly situated of their Fourteenth Amendment due process rights.

Second Amended Complaint, at 7. As this Court stated, in its October 28, 1991 Opinion and Order denying the defendants' motion to dismiss, the plaintiff class in this action seeks only declaratory and future injunctive relief enjoining the defendants from following the challenged procedures. The Court specifically noted that this action did not, and indeed could not, challenge the lawfulness of the current confinement of any member of plaintiff class, because such an attack is properly brought only in the context of a habeas corpus action under 28 U.S.C. §2241. See Preiser v. Rodriguez, 411 U.S. 475 (1973). Because the procedures challenged by the second amended complaint no longer have any force or effect in the State of Ohio, this Court concludes that the issues joined by the second amended complaint and the answer thereto have, by passage of OAR §5120:1-1-21, been rendered moot. Accordingly, defendants are entitled to judgment as a matter of

law.[3]

WHEREUPON plaintiffs' motion for summary judgment is without merit and it is therefore DENIED. The claims asserted in the second amended complaint have been rendered MOOT by the passage of OAR §5120:1-1-21 and, for that reason, the defendants' motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk is DIRECTED to enter FINAL JUDGMENT for the defendants.

Sandra S. Beckwith, Judge
United States District Court

[3]This determination does not, of course, impact upon the right of any member of the plaintiff class to challenge, in a petition for a writ of habeas corpus, the constitutionality of his current confinement under former procedures.

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

Southern District of Ohio

KENNETH J. MURPHY
93 MAY 28 AM 10:00
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al

JUDGMENT IN A CIVIL CASE

vs

Case No. C2-90-606

Judge Beckwith
Magistrate Judge King

JOHN W. SHOEMAKER, et al

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED. FINAL JUDGMENT is entered for the defendants.

Date: May 28, 1993

Kenneth J. Murphy, Clerk

Peg Lambert

By Peg Lambert /Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs. Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs, a class of inmates whose parole was revoked by the Ohio Adult Parole Authority ["APA"], brought this action on behalf of themselves and of a class of plaintiffs, for prospective declaratory and injunctive relief pursuant to 42 U.S.C. §1983, alleging that defendants denied them procedural due process under the Fourteenth Amendment during the course of plaintiffs' revocation proceedings. On May 27, 1993, this Court granted summary judgment in favor of defendants. Opinion and Order of May 27, 1993. Final judgment was entered on May 28, 1993. This matter is now before the Court on plaintiffs' motion to alter or amend that judgment, Rule 59(e), Fed. R. Civ. P., and on plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying plaintiffs' Rule 16(f) motion for sanctions against defendants. Rule 72, Fed. R. Civ. P.

The plaintiff class consists of parolees who were convicted of a subsequent felony while on parole, and whose parole was subsequently revoked as a parole violator recommissioned

["PVR"]. Plaintiffs originally claimed that their PVR hearings failed to comport with procedural due process. They asked that the Court declare that defendants' PVR procedures violated plaintiffs' procedural due process rights, Second Amended Complaint, and enjoin defendants from following PVR procedures violative of plaintiffs' procedural due process rights. Id.

During the course of this litigation, Ohio Administrative Code ["OAC"] §5120:1-1-19(A)(1), the former administrative regulation dealing with PVR procedures, was repealed and OAC §5120:1-1-21 was implemented. After evaluating this new regulation by reference to Black v. Romano, 471 U.S. 606 (1985), this Court concluded that OAC §5120:1-1-21, which divested the Ohio Adult Parole Authority ["APA"] of all discretion regarding the revocation of a PVR's parole, is constitutional. Opinion and Order of May 27, 1993. See also Sneed v. Donahue, 993 F.2d 1239, 1243 (6th Cir. 1993). The Court further held that, because the procedures challenged in the second amended complaint were no longer in effect, the case has been rendered moot. Opinion and Order of May 27, 1993. Final judgment for defendants was entered on May 28, 1993.

Plaintiffs now seek to amend this Court's judgment, arguing that the application of OAC §5120:1-1-21 to members of the plaintiff class whose parole had been revoked under the old regulation violates the constitutional prohibition against ex post

facto laws. See Article I, Section 10, United States Constitution.[1]

In order to demonstrate a violation of the ex post facto clause contained in the United States Constitution, plaintiffs must establish that the law at issue 1) is retroactive in application and 2) "must disadvantage the offender affected by it." Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)); Dale v. Haeberlin, 878 F.2d 930, 935 (6th Cir. 1989), cert. denied, 494 U.S. 1058 (1990). The new regulation has not been applied to remedy any defect in the revocation procedures followed in the past. Accordingly, defendants have not retroactively applied OAC §5120:1-1-21 to the subclass of plaintiffs whose parole had been earlier revoked pursuant to former OAC §5120:1-1-19(A)(1). Defendants cannot, and do not, argue that this subclass of plaintiffs will be subjected to OAC §5120:1-1-21. Accordingly, plaintiffs have failed to establish an ex post facto violation in this action.

As this Court ruled in its Opinion and Order entered May 27, 1993, the relevant analysis turns to whether or not plaintiffs' claims for relief are moot. Plaintiffs' sole claim for injunctive relief sought to restrain defendants from violating plaintiffs' procedural due process rights in the future through the use of constitutionally infirm PVR hearings or procedures. Plaintiffs no longer have any procedural due process rights to a meaningful

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[1]The Eleventh Amendment prevents this Court from considering claims under Ohio's Constitution. See Pennhurst State School and Hospital v. Haldeman, 465 U.S. 89 (1984).

hearing in connection with PVR parole revocation proceedings in connection with felonies committed after the effective date of the new regulation. Accordingly, the enactment of OAC §5120:1-1-21 has rendered plaintiffs' claims for future injunctive relief moot.

Plaintiffs assert that their claims for declaratory relief are not rendered moot by the enactment of OAC §5120:1-1-21. This Court disagrees. Where the plaintiffs "seek[] a declaratory judgment as to [the Parole] Board's past actions -- without any substantive relief involved -- neither the Declaratory Judgment Act standard (28 U.S.C. §2201) nor Article III's 'case' or 'controversy' requirement is satisfied." Jackson v. Illinois Prisoner Review Board, 657 F.Supp. 823, 827 (N.D. Ill. 1987), aff'd in part and rev'd in part, 856 F.2d 890 (7th Cir. 1988) (citing Green v. Mansour, 474 U.S. 64 (1985); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)). To hold otherwise would constitute "an end run around habeas corpus procedures." Foster v. Kassulke, 898 F.2d 1144, 1148 (6th Cir. 1990). Declaratory relief evaluating the constitutionality of past procedures would be the functional equivalent of a habeas corpus action, and is not available in an action under 42 U.S.C. §1983. See Preiser v. Rodriguez, 411 U.S. 475 (1973).

Plaintiffs also disagree with this Court's rejection of their argument that defendants "exceeded their rule-making authority" when OAC §5120:1-1-21 was enacted. Plaintiffs' Motion to Alter or Amend May 28, 1993 Order, p. 15. This Court expressly held that "OAC §5120:1-1-21 is a valid exercise of rule-making

authority and serves to divest individual APA panels of discretion whether or not to revoke a PVR's parole." Opinion and Order of May 27, 1993, at 12. Plaintiffs' motion to alter or amend fails to persuade this Court that the judgment of May 28, 1993 was entered in error in this regard.

Finally, plaintiffs object, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, to Magistrate Judge King's denial of plaintiffs' Rule 16(f) motion for sanctions against defendants. Notwithstanding plaintiffs' claims to the contrary, this Court concludes that Magistrate Judge King's conclusions that the circumstances in this action do not justify an award of fees or the preclusion of relevant evidence is neither clearly erroneous nor contrary to law. Accordingly, plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order are OVERRULED.

WHEREUPON plaintiffs' motion to alter or amend this Court's judgment of May 28, 1993 is without merit, and it is therefore DENIED. Plaintiffs' objections to Magistrate Judge King's May 24, 1993 Order denying sanctions against defendants are without merit, and they are therefore OVERRULED.

Sandra S. Beckwith, Judge
United States District Court

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3-22-95

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

GLENN S. KELLOGG, et al.,

Plaintiffs,

vs.

Civil Action 2:90-CV-606

JOHN W. SHOEMAKER, et al.,

Defendants.

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit.

Consistent with the mandate of the United States Court of Appeals for the Sixth Circuit, it is hereby ADJUDGED that application of Ohio Administrative Code §5120:1-1-21, to the extent applied to those members of the plaintiff class, if any, who committed initial offenses prior to the effective date of the regulation, i.e., September 1, 1992, but whose parole revocation procedures are conducted after September 1, 1992, constitutes an ex post facto law and its application to such persons is hereby ENJOINED. Those class members who committed their initial crime before September 1, 1992, but whose parole revocation proceedings are conducted after September 1, 1992, are entitled to the procedural safeguard outlined in Morrissey v. Brewer, 408 U.S. 471 (1972) and Moss v. Patterson, 555 F.2d 137 (6th Cir.), cert. denied, sub nom. Kette v. Moss, 434 U.S. 873 (1977).

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The Clerk shall enter final judgment accordingly.

Sandra S. Beckwith, Judge
United States District Court

5120:1-1-19 Revocation of release; institutional revocation hearing

(A) Within a reasonable period of time after a detainer has been filed against the releasee, or the holding of the hearing required by Administrative Regulation 5120:1-1-18, whichever is earlier, the releasee shall be granted a revocation hearing. A continuance may be granted by the Chairman of the Parole Board or designee upon application by the violator and for good cause shown.

(1) In the event a releasee is convicted and sentenced on a new felony under Ohio law, it shall be conclusively presumed that Administrative Regulation 5120:1-1-12 has been violated. In such cases, as applicable, the parole revocation hearing will be confined to the determination of mitigating circumstances.

(2) The hearing for a releasee who has been convicted in a state other than the State of Ohio, and is being returned as a violator, shall be held within a reasonable period of time after his return to confinement within the boundaries of the State of Ohio.

(B) The hearing panel shall consist of a member or members of the Parole Board, any hearing officer, or any hearing body appointed by the Parole Board.

(C) The hearing shall be held pursuant to the procedure as set forth in Administrative Regulation 5120:1-1-18. Requests for witnesses and all motions for clarification of charges, suppression of evidence, and all other motions, shall be made at least ten (10) working days prior to the scheduled hearing unless such requirement is waived by the Chairman of the Parole Board or designee in whole or in part, and for good cause shown. Requests shall be made to the Chairman of the Parole Board or designee in lieu of the unit supervisor.

(D) If at the hearing it is found by substantial evidence, considering the record as a whole, that the alleged violation has been proved and that mitigating circumstances, if any, do not make revocation inappropriate, release shall be revoked by the Parole Board.

(E) If at the hearing there is no substantial evidence, considering the record as a whole, that the alleged violation has been proved, or if the hearing panel, in its discretion, determines that revocation of release is inappropriate even if the alleged violation has been proved, the inmate shall be released to his former status, provided, however, that in the discretion of the Parole Board the terms and conditions of release may be modified in order to assist the releasee in his adjustment to society and to his rehabilitation, pursuant to Administrative Regulation 5120:1-1-12.

OHIO ADMINISTRATIVE CODE, APPROVED EDITION5120 DEPARTMENT OF REHABILITATION AND CORRECTION5120:1 DIVISION OF PAROLE AND COMMUNITY SERVICESChapter 5120:1-1 Release

5120:1-1-21 REVOCATION OF RELEASE IF RELEASEE RECOMMITTED FOR NEW OFFENSE

(A) The adult parole authority shall revoke the release of any releasee who is recommitted to the department of rehabilitation and correction to serve a sentence imposed upon him by any court in Ohio for an offense he committed while on any release granted by the adult parole authority or while serving a period of intermediate transitional detention pursuant to *rule 5120-11-12 of the Administrative Code* or serving a period of parole supervision pursuant to *rule 5120-11-19 of the Administrative Code*.

(B) This revocation shall be accomplished by the issuance of minutes by the adult parole authority after it has verified that the sentence was imposed for an offense that occurred while the prisoner was under release status.

(C) If the prisoner was on release from a definite sentence only, is recommitted to serve a definite sentence or sentences, and is not serving any indefinite sentence, there shall be no further release consideration and the offender shall serve the balance of the aggregate definite sentence, diminished pursuant to *rules 5120-2-04* through *5120-2-08 of the Administrative Code*, unless the prisoner becomes eligible for release on furlough pursuant to *rule 5120:1-1-23 of the Administrative Code*.

(D) If the prisoner was on release from an indefinite sentence or one or more sentences for which he is recommitted is an indefinite sentence, he shall be scheduled for a parole release hearing when eligible pursuant to *rules 5120-2-03* through *5120-2-08* and *rule 5120:1-1-13 of the Administrative Code*.

OHIO REVISED CODE

2967.15 VIOLATION OF PARDON OR PAROLE

(A) Any adult parole authority field officer who has reasonable cause to believe that any parolee, furloughee, or other releasee under the supervision of the adult parole authority has violated or is violating any term or condition of his pardon, parole, furlough, or release may arrest the person without a warrant or order any peace officer to arrest the person without a warrant. A person so arrested shall be confined in the jail of the county in which he is arrested or in another facility designated by the chief of the adult parole authority until a determination is made regarding his release status. Upon making an arrest under this section, the arresting or supervising adult parole authority field officer promptly shall notify the superintendent of parole supervision or his designee, in writing, that the person has been arrested and is in custody and submit in detail an appropriate report of the reason for the arrest.

(B) Subsequent to the arrest of a parolee, furloughee, or other releasee pursuant to this section, the person shall be granted a hearing to determine whether he has violated the terms and conditions of his pardon, parole, furlough, or release and whether he should be returned to a state correctional institution, except that a parolee, furloughee, or other releasee who is convicted of or pleads guilty to any offense committed while on parole, furlough, or other release is not entitled to the hearing. A member of the parole board, a hearing officer, or other person designated by the chief of the authority shall conduct the hearing in accordance with rules adopted by the director of rehabilitation and correction.

If the person who conducts the hearing decides that the parolee, furloughee, or releasee does not have to return to a state correctional institution, he immediately shall be released, provided there are no unadjudicated criminal charges pending against him in this state.

If the person who conducts the hearing decides that the parolee, furloughee, or releasee should return to a state correctional instition [sic], the superintendent, within a reasonable time, shall order his return to an institution.

If a parolee is declared to be a violator of the conditions of his pardon, the authority forthwith shall transmit to the governor its recommendation concerning such violation and the violator shall be retained in custody until the governor issues an order concerning such violation.

If the authority fails to make a determination of the case of the parolee alleged to be a violator of the conditions of his pardon or parole within a reasonable time, the parolee shall be released from custody under the same terms and conditions of his original pardon or parole.

(C)(1) If a parolee, furloughee, or other releasee absconds from supervision, that fact shall be reported by the superintendent to the authority, in writing, and the authority shall enter an order upon its official minutes declaring that person to be a violator at large. The superintendent, upon being advised of the apprehension and availability for return of a violator at large, shall recommend to the authority that he be returned to the institution or restored to parole, furlough, or other release. If the violator is not restored to parole, furlough, or other release, he shall be returned to a state correctional institution.

The time between the date on which a parolee, furloughee, or other releasee is declared to be a violator or violator at large and the date on which that person is returned to custody in this state under the immediate control of the adult parole authority shall not be counted as time served under the sentence imposed on that person.

(2) A furloughee or any releasee other than a person who is released on parole or pardon is considered to be in custody while on furlough or other release, and, if he absconds from supervision, he may be prosecuted for the offense of escape.

(D) A parolee, furloughee, or other releasee who has violated any term or condition of pardon, parole, furlough, or other release shall be declared to be a violator if he is committed to a correctional institution outside the state to serve a sentence imposed upon him by a federal court or a court of another state or if he otherwise leaves the state.

(E) As used in this section, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.